IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

2 June 2021

CASE No: AIFC-C/SCC/2021/001

DAULETOV AZAMAT KHALIBAYEVICH

Claimant

and

GRUPPO RF KAZAKHSTAN LLP

Defendant

JUDGMENT

Justice of the Court:

Justice Patricia Edwards

1. This claim is brought by Dauletov Azamat Khalibayevich, who is said to represent "employees of the RF Group Kazakhstan". The claim was commenced and served on the Defendant on 20 January 2021.

2. In accordance with Rule 28.12 of the AIFC Court Rules, the Defendant had until 3 February 2021 to admit the claim, file a defence or dispute the jurisdiction of the Court. On 9 February 2021, the Defendant applied for an extension of time until 11 February 2021 to file a Defence. This was granted and the Defence was filed and served on 11 February 2021.

3. The employees were, until December 2020, working on a chemical plant under construction in Kazakhstan. By an order of the Defendant dated 10 December 2020, they were dismissed. However, the Claimant alleges that their salaries were not paid. The remedy sought is "wage arrears to employees for November and December 2020". The Claimant requested resolution of the claim on paper without a hearing.

4. A group of the employees and the Defendant entered into a mediation agreement dated 20 December 2020. Following the mediation, a purported settlement agreement was drawn up on 21 December 2020. Paragraph 6(2) of the agreement provides: "On December 22, 2020, Party 1 [the Defendant] undertakes to Party 2 to pay wages in arrears for the period November-December and pay for unused vacation for 2020". Paragraph 7 of the settlement agreement contains an exclusive jurisdiction clause in favour of the AIFC Court.

5. According to the claim, at a meeting on 22 December 2020, at the request of the head of the Defendant (Walter Riva Cambrino) the employees agreed that payment could be delayed until 25 December 2020.

6. The claim is defended on grounds including that:

   (1) The settlement agreement is not a binding contract because agreement was not reached on all essential elements. The Defendant refers to the fact that the agreement does not state the names of the relevant employees, the amounts due to them, or the term for payment of the debt.

   (2) The Claimant provided no documents confirming his right to act on behalf of the employees.

   (3) The "signatures of the parties" sheet was not signed by the director of the Defendant.

(4) The director of the Defendant does not speak Russian, and thought that the agreement was "a memorandum of intent to sort out the situation".

Order of 16 February 2021

7. Pursuant to Rule 28.9 of the AIFC Court Rules, a claimant must include in the Claim Form a statement of the monetary value of the small claim. The Claimant did not do so. However, the court can make an order to remedy a failure to comply with a rule (Rule 3.4), and considered it appropriate and in accordance with the overriding objective (Rule 1.6) to do so in this case, in order to deal with the case expeditiously, proportionately and fairly. Accordingly, on 16 February 2021, I made an order for all employees or former employees of the Defendant who claim wages as set out in the claim to be named in a schedule, to include in respect of each individual, their name, the sum claimed, and their signature, consenting to be joined as a claimant.

8. Paragraph 2 of the order provided that each individual named in the schedule would be joined as a claimant in this action. Part 12 of the AIFC Court Rules provides for the possibility of representative claims to be brought where the parties have the same interest (Rule 12.18), or for parties to be added to existing proceedings on the Court's initiative or on application of an existing or potential party (Rule 12.2). These rules are not expressly applicable to the SCC (Rule 28.7). However, the Court has the power to take all steps that are required or expedient for the proper determination of the case (Rule 3.1) and may exercise its powers of its own initiative (Rule 3.5). I considered it appropriate for the proper determination of this case for all relevant employees to be joined as claimants, and to state the amount of their claim.

9. Further, following the service of the Defence, the Court may require the parties to provide further information about their case and file any further evidence upon which they intend to rely (Rule 28.25). In light of the matters raised in the Defence, and the further information to be provided in relation to the claim, I considered that it was appropriate for each party to have the opportunity to provide further information and evidence about their case. The order of 16 February 2021 therefore provided the opportunity for each party to file and serve further submissions and evidence.

10. As the parties were not given an opportunity to make representations in relation to the order of 16 February 2021, it provided in paragraph 5 that they could apply to have it set aside, varied or stayed within 7 days of service of the order, in accordance with Rule 3.8. No such application was made.

Order of 20 April 2021

11. No schedule or other documents were filed following the order of 16 February 2021. On 20 April 2021, I made a further order in similar terms. However, this order provided that unless a schedule was filed (including the name of each claimant, the sum claimed, and their signature, consenting to be joined as a claimant), by 4 May 2021, then the claim would be struck out. This deadline was more than three months after the claim was commenced. That is a considerable period of time in the context of a small claim. The information required was necessary for the Defendant to understand the case it had to meet, and to be able to respond properly and proportionately. Again, the order set out expressly the right of either party to apply within 7 days to set aside, vary or stay the order.

12. On 4 May 2021, the Claimant filed a timesheet containing a list of 107 employees, and a copy of the employment contract of one of the employees. He quantified the claim for wages in the amount of 15,762,586.02 tenge. That is equivalent to approximately US$37,000. However, none of the proposed additional claimants has provided their signature consenting to being joined as a claimant in this action.

13. The Defendant has not responded or filed any further documents.

Conclusion

14. The information to be included in the schedule was the bare minimum necessary for the Defendant to understand the case it had to meet, including the number and identity of the claimants, and the sums claimed. It should have been provided at the commencement of the claim in January 2021. Without it, the Defendant cannot respond properly and proportionately to the claim. A proportionate response is all the more important in the context of small claims proceedings, which are intended to keep the costs incurred by all parties to a minimum. It is also very difficult for parties to settle a claim where it is not properly made.

15. Legal proceedings are a formal process and it is essential that the Court is assured that the claims are authorised by the parties said to be bringing them. The importance of a potential party providing signed consent to becoming a claimant to an action is underlined by Part 12 of the Rules which, while not expressly applicable in the SCC, deals with addition of parties in proceedings. It provides that nobody may be added as a claimant unless he has given his consent in writing, and that consent has been filed with the Court.

16. The order of 20 April 2021 provided that, if a complete schedule was not filed by 4 May 2021, the claim would be struck out without further order. No signatures of the purported additional claimants having been provided, consenting to being joined as claimants, the claim is now struck out.

17. In accordance with Rule 26.9, I do not consider it appropriate to make any order as to costs.

By the AIFC Small Claims Court,

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 February 2021

CASE No: AIFC-C/CFI/2020/0010

MODTECH GROUP TEKNOLOJI SISTEMLERI LTD

Claimant

V

MOSSTON ENGINEERING LTD

First Defendant

and

KAZTECHNOLOGY JSC

Second Defendant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. It is declared that the claims by the Claimant against the First Defendant and the Second Defendant fall outside the jurisdiction of the AIFC Court.

2. The claims are dismissed accordingly for lack of jurisdiction.

JUDGMENT

Introduction

1. By a claim form filed at the AIFC Court in November 2020 the Claimant, Modtech Group Teknoloji Sistemleri Ltd ("Modtech") claims (1) the sum of US$ 5,100,000 (five million one hundred thousand US dollars) from the First Defendant, Mosston Engineering Ltd ("Mosston"), and (2) the sum of US$ 1,600,000 (one million six hundred thousand US dollars) from the Second Defendant, Kaztechnology JSC ("Kaztechnology").

2. This is my judgment on the preliminary issue, ordered in circumstances described below, of whether the claims fall within the jurisdiction of the Court.

3. The events that give rise to the claims involve four companies, as follows:

   (1) Modtech is a Private Company registered in the Astana International Financial Centre ("the AIFC").

   (2) Mosston is a company incorporated in the Seychelles in June 2005 and redomiciled into the Marshall Islands in July 2016.

   (3) Kaztechnology is a Joint Stock Company incorporated under the law of the Republic of Kazakhstan.

   (4) A fourth company with an important role, though not itself a party to these proceedings, is Fameway Investments Ltd ("Fameway"), a Cypriot state enterprise.

4. The claims relate to payments made under two contracts for the sale of goods. The sums paid are said to have been repayable by reason of the sellers' non-performance or incomplete performance of their supply obligations under the contracts. The contracts in question are:

   (1) Contract No. 7/15 dated 2 April 2015 between Kaztechnology as seller and Mosston as buyer ("Contract 7/15"), together with an amendment agreement of the same date between Kaztechnology, Mosston and Fameway; and

   (2) Contract No. 15/45 dated 29 May 2015 between Mosston as seller and Fameway as buyer ("Contract 15/45").

5. As explained below, payments under both contracts were made to the seller by Fameway and any right to recover those payments lay originally with Fameway rather than with Modtech (which was

not a party to the contracts or the payments). As against Mosston, however, Modtech relies on an agreement dated 27 August 2020 and made between Modtech and Fameway ("the Assignment Agreement") by which there was assigned to Modtech what was said to be an outstanding debt in the sum of US$ 5,100,000 owed by Mosston to Fameway. The basis on which Modtech claims to be entitled to recover the sum of US$ 1,600,000 from Kaztechnology is less clear.

Procedural history

6. Modtech's claim form set out the claims against Mosston and Kaztechnology and referred to a number of supporting documents which helped to clarify the nature of the claims.

7. In response, Mosston filed an acknowledgement of service and two documents but did not file a defence or make an application under Part 8 of the AIFC Court Rules disputing jurisdiction.

8. Kaztechnology filed a brief defence, taking issue with the claim on grounds of jurisdiction and substance.

9. Modtech did not file a reply.

10. I then issued draft case management directions, directing the parties to consider the draft and to agree or make submissions on the directions proposed with a view to progressing the case to trial. The draft included a paragraph identifying provisionally the main issues of jurisdiction and substance in the case. In response, Modtech made submissions on the issues both of jurisdiction and of substance and filed further documents in support but did not otherwise address the draft directions. Mosston set out its position that the Court has no jurisdiction to hear the dispute and requested an order to that effect under Rule 8.8 of the AIFC Court Rules (without making any formal application under Part 8) but did not otherwise address the draft directions. Kaztechnology repeated its submission on jurisdiction and added briefly to its submissions on the substance of the claim but did not otherwise address the draft directions.

11. In the light of the parties' responses I ordered that the question whether the Court has jurisdiction in relation to the claims against Mosston and Kaztechnology be determined as a preliminary issue, to be heard by video link on 16 February 2021. I indicated that if the Court were found to have jurisdiction in relation to either or both of the claims, I would issue further directions for the trial of the claim or claims.

12. The hearing took place as scheduled on 16 February 2021, when I received commendably succinct oral submissions from Mr Temir Ibrayev on behalf of Modtech, from Mr Ruslan Kubrakov on behalf of Mosston, and from Ms Aizhan Kalambayeva on behalf of Kaztechnology.

The factual history

13. By Contract 7/15, dated 2 April 2015, Kaztechnology agreed to sell to Mosston various products specified in Annex No.1 to the contract (namely items of ammunition). The total contract price was US$ 14,839,122.16. Payment terms included:

> "4.1 Contract payment is made in US dollars as follows:
>
> 4.1.1. Buyer is obliged to make an advance payment in amount of 1,600,000 (one million six hundred thousand US dollars) within 10 (ten) days since Contract signing

4.1.2 Buyer is obliged to pay remaining amount (except advanced payment) before batch shipment after obtaining a transport license and acceptance at Seller warehouse."

In a section of the contract headed "Legislation and Arbitrage" it was provided that "all debates originating in terms of Contract, Parties must settle by negotiation" (clause 11.1); that "In case when Parties cannot come to an agreement, all debates and disputes must be regulated in accordance with the Rules of Conciliation and Arbitration of the International Court of Arbitration" (clause 11.2); and that "Arbitration decision is final and binding for the Parties" (clause 11.3). The place of conclusion of the contract was stated to be Dubai, UAE. The contract was stated to be drawn up in the Russian language: a certified translation into English has been provided to the Court.

14. An "Amendment agreement to the Contract No. 7/15", also dated 2 April 2015 ("the amendment agreement") was entered into between Kaztechnology as seller, Mosston as buyer and Fameway as "payer". It recorded that the parties were all aware of the terms of Contract 7/15 and that they agreed to add the following point 4.1.3 to those terms:

> "4.1.3. The Buyer has the right to fulfil the obligation for making the advance payment and/or other payments, mentioned by this Contract both personally and through the Company-Payer Fameway Investments ltd. on terms indicated in this Contract, with immediate and obligatory written notification of the Buyer.
>
> Factual fulfilment by the Company Fameway Investments ltd. of the obligations for making the advance payment and/or further payments is recognized by corresponding fulfilment of Buyer's obligations by himself regarding the payment of debts.
>
> Seller and Buyer came to the agreement that any payment from the Company Fameway Investments ltd. to the Seller are being estimated (understood) as the fulfilment of money liabilities by the Buyer within the frames of this Contract towards the Seller and voluntary and conscientious transfer of debt in amount of paid amount by the Buyer to the Company Fameway Investments ltd.
>
> Payer shall make the advance payment in amount of 1,600,000 US dollars to the account of Seller. In case of making an advance payment and other payments by this Contract by the company Fameway Investments ltd., all expenses relating to the payment of purchase costs, including all amounts of banking commissions, are being paid by the Company Fameway Investments ltd."

15. The case pleaded in the claim form is that the claimant, i.e. Modtech itself, made the advance payment of US$ 1,600,000 due to Kaztechnology under clause 4.1.1 of Contract 7/15. The claim form states that although Mosston was the party obliged to make the payment, Mosston did not have the resources to make it, so Modtech proceeded to make the payment on behalf of Mosston. It states further that the contract was not completed as the goods were destroyed in a warehouse fire, which is the basis of the claim to recovery of the advance payment. Despite the way in which the case is pleaded, however, it is clear that Modtech's actual case is that the advance payment of US$ 1,600,000 to Kaztechnology was made by Fameway in accordance with clause 4.1.3 of Contract 7/15 as inserted by the amendment agreement, and that the right to recover that sum for failure to supply the goods lay originally with Fameway but now lies with Modtech. At the hearing, Mr Ibrayev confirmed this to be Modtech's case; and the supporting documents supplied to the Court by Modtech include a wire transfer statement evidencing the transfer of US$ 1,600,000 by Fameway to Kaztechnology on 10 April 2015.

16. Modtech's claim to be entitled to recovery of the US$ 1,600,000 is disputed by Kaztechnology. There may well be factual issues: for example, on the limited material I have seen it seems to me possible that the goods covered by the advance payment of US$ 1,600,000 were in fact delivered to Mosston and that any non-delivery related only to some later consignments. But there are also substantial legal issues. The basis on which Modtech seeks effectively to stand in the shoes of Fameway for the purposes of recovery against Kaztechnology is not clear to me: Modtech does not rely directly on the Assignment Agreement since that relates only to an outstanding debt said to have been owed by Mosston to Fameway. Further questions that appear to me to arise are whether, having regard in particular to clause 4.1.3 of the amended Contract 7/15, the advance payment, although made in fact by Fameway, is to be treated as having been made by or on behalf of Mosston and, if so, whether any right to recover the payment from Kaztechnology lay with Mosston rather than with Fameway, whilst Fameway had a separate right to be reimbursed by Mosston in respect of its expenditure on the advance payment. I mention these points in order to indicate the potential scope of the dispute between Modtech and Kaztechnology.

17. The second relevant sale contract is Contract 15/45, dated 29 May 2015, by which Mosston agreed to sell to Fameway various products listed in Appendix No.1 to the contract (again items of ammunition, but overlapping only to a small extent with those specified in Contract 7/15). The total contract price was US$ 17,930,000. Payment terms were:

> "4.1.1. The Buyer shall make the advance payment in the amount of twenty (20) percent of the whole amount of the Contract, that comprises 3,586,000 (three million five hundred and eighty six thousand) US dollars only within 3 (three) calendar days following the day the contract is signed.
>
> 4.1.2. After, the Buyer shall make the payment in amount of 3,586,000 (three million five hundred and eighty six thousand) US dollars, that comprises (20) percent of the whole amount of the Contract by June 15th 2015.
>
> 4.1.3. The rest 60% of the whole amount of the Contract that comprises 10,758,000 (ten millions seven hundred and fifty eight thousand) US dollars, the Buyer shall transfer to the account of the Seller after the provision of export license."

The contract stated further that Dubai, United Arab Emirates, was regarded as the place of conclusion of the contract and that the contract was signed in two side-by-side versions, in the Russian and English languages: both versions were to have the same meaning but in the event of a discrepancy the English version was to prevail. There was no arbitration clause or other provision as to how any disputes were to be resolved.

18. The case pleaded in the claim form is that the claimant, i.e. Modtech, was party to the contract with Mosston and made payments under the contract which it is entitled to recover from Mosston. It is, however, clear and was confirmed by Mr Ibrayev at the hearing that Modtech's actual case depends not on any original involvement by it in the transaction but on the subsequent assignment to it of a debt owed by Mosston to Fameway. In substance it is contended that (i) Fameway was party to Contract 15/45 and made payments under it; (ii) Mosston did not fulfil its obligation to supply the goods, with the consequence that Fameway was entitled to recover the payments made; (iii) the amount owed by Mosston to Fameway as at 27 August 2020 was US$ 5,100,000; and (iv) that debt was assigned by Fameway to Modtech by the Assignment Agreement.

19. Although Mosston has not served a Defence, it was confirmed by Mr Kubrakov at the hearing that Mosston disputes the alleged debt of US$ 5,100,000 to Fameway. How that sum was calculated for the purposes of the Assignment Agreement is unclear: the agreement annexes a "Reconciliation Report" which does not produce a clear-cut answer. The matter does not need to be resolved for the purposes of the preliminary issue of jurisdiction, but some consideration of it is important for an understanding of the scope of the dispute between the parties. For that reason I refer below to relevant material before the Court, before setting out the terms of the Assignment Agreement.

20. That Fameway made payments to Mosston amounting in total to US$ 9,887,000 is evidenced by wire transfer statements filed with Modtech's claim form which show payments on the following dates: on 2 June 2015, the sum of US$ 3,586,000 (the amount of the advance payment due under clause 4.1.1 of Contract 15/45); on 5 June 2015, the further sum of US$ 3,586,000 (the amount of the payment due under clause 4.1.2); and the further sums of US$ 1,000,000 on 21 August 2015 and of US$ 1,715,000 on 24 September 2015.

21. One of the documents filed by Mosston is an "Agreement for Set-off of Amounts" made between Mosston, Fameway and Aheloy OPM OOD, a Bulgarian company with no direct involvement in these proceedings ("the Set-off Agreement"). The document is in English and is dated 26 May 2016. It provides as follows:

> "Aheloy OPM OOD has paid advances for delivery of Defense related products to Alguns EOOD / Fameway Investments Ltd in the total amount of USD 6,019,010.00.
>
> The above mentioned amount will be deducted from the payments made from Fameway Investments Ltd to Mosston Engineering LTD and will be transferred to contract No AH/ME/12/2015 and contract No AH/ME/13/2015.
>
> With this agreement all the Alguns EOOD / Fameway Investments Ltd delivery obligations, which received advance payments, to Aheloy OPM OOD are closed.
>
> With this agreement all the Mosston Engineering LTD obligations to return the advance payments to Fameway Investments in amount of USD 6,019,000 are drop out.
>
> Aheloy OPM OOD has the obligation to pay to Mosston Engineering LTD up to the full amounts of the above mentioned two contracts and according the full statement of business relations between the both companies."

22. Just two weeks later, on 8 June 2016, Mr Davit Galstyan as Director of Mosston wrote the following note, seemingly to Mr Robert Odobasic, the Manager of Fameway:

> "Robert,
>
> Transferred amount from your side comprises to:
>
> 1) 11,487,000 US dollars plus 200,000 USD, that in total amount comprises to 11,687,000 USD
>
> 2) Cession with Aheloy OPM comprises to 6,019,010 USD

3) The amount of the contract for S-8 KOM rockets comprises to 4,655,200 USD

4) also 500,000 USD is the amount for delay of presenting EUC from your side.

The debt at this moment is 512.790 USD.

This is the situation for this moment.

For which 2 mln you are talking about I do not know.

The rest 512,790 USD will be set-off after presenting of IIC for S-8 KOM and DVC from Saudi Arabia."

That note appears on a copy of the last page of Contract 15/45 but the note is dated long after the conclusion of that contract and refers to matters evidently going well beyond the scope of the contract. The document itself was filed by Modtech with the Assignment Agreement and appears to be the Reconciliation Report referred to in point 1.1 of that agreement (see below).

23. That brings me to the terms of the Assignment Agreement itself. The agreement is stated to have been drafted in Russian: the Court has been provided with a translation into English. The agreement is headed "Contract No. 01-270820 on claim assignment", "Nur-Sultan city", and is dated 27 August 2020 and made between Modtech as assignee and Fameway as assignor. It reads as follows:

"1.1. Taking into account that according to the Reconciliation Report of 15/45 29.05.2015 as an Annex No.1 to the Contract … Mosston Engineering Ltd, hereinafter referred to as the Debtor, has outstanding debt to Assignor in the amount of 5,100,000 USD (five million one hundred thousand); Assignor transfer to Assignee the money claim 5,100,000 USD (five million one hundred thousand) to the Debtor and Assignee is obliged to accept the Assignment within 3 (three) days after this Contract signing.

1.2. Assignor Assignment to the Debtor in the amount of 5,100,000 USD (five million one hundred thousand) is transferred to Assignee at the moment of the Contract signed by authorised representatives of Parties.

1.3. Assignor Assignment to the Debtor mentioned in point 1.1 of the Contract is transferred to Assignee under the conditions existing on the date of Contract signing within amount mentioned in point 1.1.

1.4. Herewith Parties declare and warranty that all actions taking by them within this Contract satisfy the requirements of Kazakhstan Republic existing legislation and legislation of Astana International Financial Center.

1.5. Assignor declares that the claim transferred under this Contract is valid and not assigned to the third party before and is responsible for invalidity of transferred obligation.

1.6. Obligations taken by Parties under this Contract can be considered as fulfilled since their recording in accounting registers.

1.7. This Contract comes into force since signing by all Parties and stays in force till its execution.

1.8. For all other issues not included in this Contract the Parties are guided by Kazakhstan Republic existing legislation and legislation of Astana International Financial Center."

24. If the "Reconciliation Report of 15/45 29.05.2015" referred to in point 1.1 of the Assignment Agreement is indeed the note dated 8 June 2016 described above, apparently written by Mr Galstyan of Mosston to Mr Odobasic of Fameway, it is not obvious how the figure of US$ 5,100,000 by way of outstanding debt is derived from it; nor is that figure otherwise explained.

Jurisdiction

25. The jurisdiction of the AIFC Court is laid down in Article 13 of the Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre (Constitutional Statute No. 438-V ZRK of 7 December 2015, as subsequently amended):

> "4. The AIFC Court has exclusive jurisdiction in relation to the hearing and adjudication of the following disputes …:
>
> 1) disputes between AIFC Participants, AIFC Participants and AIFC Bodies and an AIFC Participant or AIFC Body and its expat Employees;
> 2) disputes relating to activities conducted in the AIFC and governed by the Acting Law of the AIFC;
> 3) disputes transferred to the AIFC Court by agreement of the parties.
>
> …
>
> 10. The AIFC Court has exclusive jurisdiction to interpret AIFC Acts."

26. Article 1(5) of the same Constitutional Statute defines "AIFC Participants" as "legal entities registered under the Acting Law of the AIFC and legal entities recognised by the AIFC". By Article 4.1, the "Acting Law of the AIFC" consists of the Constitutional Statute itself, AIFC Acts which are not inconsistent with the Constitutional Statute, and "the Acting Law of the Republic of Kazakhstan, which applies in part to matters not governed by this Constitutional Statute and AIFC Acts".

27. The relevant provisions of Article 13 of the AIFC Constitutional Statute are reflected in Article 26(1) of the AIFC Court Regulations (Resolution of the AIFC Management Council dated 5 December 2017):

> "The Court has exclusive jurisdiction, as provided by Article 13 of the AIFC Constitutional Statute, in relation to:
>
> (a) any disputes arising between the AIFC's Participants, Bodies and/or their foreign employees;
> (b) any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC;
> (c) any disputes transferred to the Court by agreement of the parties; and
> (d) the interpretation of AIFC Acts."

28. Article 26(2) of the Regulations provides that the reference to "disputes" between the parties mentioned applies to civil and commercial disputes arising from transactions, contracts, arrangements or incidences. By Article 26(3), the reference to "transferred to the Court by agreement of the parties" applies to all parties, including parties not registered in the AIFC, such that all parties may "opt in" to the jurisdiction of the Court by agreeing to give the Court jurisdiction pre- or post-dispute.

29. For convenience I will refer below only to Article 26(1) of the AIFC Court Regulations, on the basis that despite slight differences in wording between it and Article 13 of the AIFC Constitutional Statute the substance of the two sets of provisions must be the same and they must be given the same effect.

30. Modtech does not rely on Article 26(1)(a) or (d) for the purposes of jurisdiction in this case. It is accepted that the disputes that arise are not between the AIFC's Participants (Modtech alone is an AIFC Participant for this purpose) or otherwise within (a), and that the disputes do not involve the interpretation of AIFC Acts within (d). The focus of attention is on Article 26(1)(b) and (c).

31. As regards Article 26(1)(b), Modtech's contention is that by clauses 1.4 and 1.8 of the Assignment Agreement the parties to that agreement have agreed that the law of the AIFC is to regulate relations under the agreement. As set out above, clause 1.4 contains a declaration and warranty by the parties that "all actions tak[en] by them within this Contract satisfy the requirements of Kazakhstan Republic existing legislation and legislation of Astana International Financial Center"; and clause 1.8 states that for issues not included in the agreement the parties "are guided by Kazakhstan Republic existing legislation and legislation of Astana International Financial Center". Mr Ibrayev submitted that the Assignment Agreement was entered into with a deliberate choice of AIFC law in order to bring the matter within the jurisdiction of the AIFC Court. He referred to the positive benefits of that jurisdiction and also to the absence of any clear basis of jurisdiction in the relations that existed between Mosston and Fameway. He said that the Assignment Agreement made reference to the law of the Republic of Kazakhstan as well as to the law of the AIFC because of certain gaps in AIFC law, in particular as regards currency transactions which are governed by the law of the Republic of Kazakhstan.

32. Those submissions face several difficulties. First, they apply only to the claim against Mosston, since the Assignment Agreement relates specifically to an outstanding debt said to be owed by Mosston to Fameway and says nothing about any rights of Fameway as against Kaztechnology.

33. Secondly, it is far from clear that the Assignment Agreement is "regulated by the law of the AIFC" within Article 26(1)(b). The clauses relied on go no further than to recite compatibility with the legislation of the AIFC as well as the existing legislation of the Republic of Kazakhstan. They do not spell out that the agreement is governed by the former rather than the latter. I think it more likely that the general law of the Republic of Kazakhstan would be held to govern the agreement, though it is unnecessary for me to reach any decision on that point.

34. Thirdly, to fall within Article 26(1)(b) a dispute must relate to "operations carried out in the AIFC *and* regulated by the law of the AIFC" (emphasis added). Both limbs of the provision must be satisfied: the dispute must relate to operations carried out in the AIFC and those operations must be regulated by the law of the AIFC. There is little to show that the making of the Assignment Agreement constituted or formed part of operations carried out in the AIFC. I doubt whether its references to the law of the AIFC and the fact that one of the parties (but not the other) was an AIFC Participant are sufficient for that purpose.

35. Fourthly, and more importantly, the disputes between Modtech and the two defendants are centred not on the Assignment Agreement but on the payments made under Contract 7/15 and Contract 15/45 and the consequences of non-performance or incomplete performance of those contracts for recovery of the payments made. Those contracts, however, have no pleaded connection with the AIFC, plainly had nothing to do with operations carried out in the AIFC, and equally plainly were not

regulated by the law of the AIFC. They predated the commencement of operations within the AIFC; and whatever law governs them, it is not the law of the AIFC. In my judgment, that is a decisive reason for rejecting jurisdiction on the basis of Article 26(1)(b).

36. To put the matter in another way, if there had been no Assignment Agreement and the claims against Mosston and Kaztechnology had been brought by Fameway, there would have been no arguable basis for finding jurisdiction under Article 26(1)(b); and the assignment to Modtech of Fameway's rights against Mosston cannot create a fundamentally different position in respect of jurisdiction.

37. As regards the effect of the Assignment Agreement, I should also mention that Mr Ibrayev relied on Article 341 of the Civil Code of the Republic of Kazakhstan which states, in the context of assignment of rights:

> "Unless it is otherwise stipulated in legislation or the agreement, the right of the initial creditor shall be transferred to the new creditor in the same volume and on the same terms which existed at the moment of the conveyance of the right. In particular, the rights shall be conveyed to the new creditor, which secure the execution of the obligation, and also any other rights which are related to the right to claim, including the right to remuneration (interest) not received."

In my judgment, however, that provision takes matters no further and gives Modtech no assistance on the issue of jurisdiction. The provision makes clear that the effect of an assignment is to transfer to the assignee (the new creditor) the rights enjoyed by the assignor (the initial creditor). But that simply brings one back to the point that the Assignment Agreement places Modtech in no better a position than the initial creditor, Fameway.

38. Turning to Article 26(1)(c) of the AIFC Court Regulations, I am satisfied that there is no basis for a finding that the disputes in this case have been "transferred to the Court by agreement of the parties". There is no agreement in any of the relevant contracts for resolution of disputes by the Court. On the contrary, Contract 7/15 contains express arbitration provisions; Contract 15/45 contains no provision for dispute resolution; and the Assignment Agreement, if relevant at all on this point, is likewise silent on the question of dispute resolution. Nor is there any subsequent opt-in by the parties to the jurisdiction of the Court.

39. Modtech contends that Kaztechnology's agreement to transfer of the dispute to the Court is to be found in a letter No. 619 dated 28 October 2020 from Kaztechnology to Modtech. The letter was sent in reply to two pre-claim letters from Modtech, both of them bearing the reference "No. 8 as of 12.10.2020". Modtech's letters referred to a decision dated 4 March 2020 of an Arbitration Panel appointed by Kazakhstan International Arbitrage LLP to determine a dispute between Mosston and Kaztechnology in respect of Contract 7/15. The Arbitration Panel had ordered Kaztechnology to repay to Mosston payments in the total sum of US$ 2,386,922.84 made by Mosston under the contract. Mosston had subsequently obtained a writ of execution to enforce the order. Modtech's pre-claim letters asserted that the amount of that debt had been transferred to Modtech under the Assignment Agreement, and requested Kaztechnology to suspend payment pursuant to the arbitration decision and writ of execution and to pay the sum instead to Modtech. Kaztechnology's reply was as follows:

> "Currently, the Company has filed a private complaint against the court decision as of October 6, 2020 on the issue of a writ of execution with the intention of further appeal against the decision of the Kazakhstan International Arbitration Court as of March 4, 2020 ….
>
> We would like to note that all payments made by 'MOSSTON ENGINEERING' LTD, were made under the contract No. 7/15 as of April 2, 2015.
>
> At the same time, we would like to inform you that regarding the collection of the amount of debt from 'MOSSTON ENGINEERING' LTD, you have the right to apply to the appropriate authorities, including the 'Astana' International Financial Center."

40. In the last paragraph of that letter, Kaztechnology did no more than refer to Modtech's existing right to apply to the appropriate authorities, including the AIFC. It did not agree to submit to the jurisdiction of those authorities or purport to give them any jurisdiction that they would not otherwise have. It was referring moreover to collection of a debt from Mosston, not to any claim against Kaztechnology, and what was said could not have any effect on the position of Mosston since Mosston was not a party to the correpondence. Thus, the letter did not involve any agreement either by Kaztechnology or by Mosston for transfer of Modtech's disputes with them to the AIFC Court.

41. I should mention for completeness that, according to Kaztechnology's submissions in response to the draft case management directions, the decision of the Arbitration Panel was annulled by Almaty City Court on 12 January 2021, though Mosston has the right to appeal the ruling within 6 months of that date. As things stand, therefore, the decision of the Arbitration Panel has no separate relevance to the present proceedings.

42. Finally, since Mr Ibrayev sought to rely on the cumulative effect of his various arguments as establishing the jurisdiction of the AIFC Court to hear the claims, I should make clear my view that putting the arguments together does not cure their individual weaknesses or otherwise affect my analysis or conclusion.

Conclusion

43. For the reasons given above, I conclude that the Court does not have jurisdiction in respect of Modtech's claims against either Mosston or Kaztechnology. The appropriate way to give effect to my conclusion is to make a declaration to that effect and to dismiss the claims for lack of jurisdiction.

44. Any application for permission to appeal under Part 29 of the AIFC Court Rules against this Court's Order, and any application for costs under Part 26, must be made in writing and will be decided on the papers.

By the Court,

Representation:

The Claimant was represented by Mr. Temir Ibrayev (ABROY Boutique Law Firm).

The First Defendant was represented by Mr. Ruslan Kubrakov (Law Firm Sunkar LLP).

The Second Defendant was represented by Ms Aizhan Kalambayeva (in-house lawyer, Kaztechnology JSC).

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 January 2021

CASE No: AIFC-C/SCC/2020/0011

DIMPULSE LIMITED

Claimant

and

MINING TECHNOLOGY KZ LLP

Defendant

ORDER

Justice of the Court:

Justice Patricia Edwards

ORDER

BY REQUEST:

1. The claim is discontinued.

By the AIFC Small Claims Court,

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

30 January 2021

CASE No: AIFC-C/CFI/2021/0002

UNICORN CROPS LIMITED

Claimant

V

ZEREN BIDAI GROUP LIMITED LIABILITY PARTNERSHIP

Defendant

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. The Court sanctions under section 124 of the AIFC Companies Regulations the proposed arrangement for a reconstruction involving the amalgamation of the Defendant with the Claimant.

2. Pursuant to section 126 of the AIFC Companies Regulations the Court orders that the Defendant be amalgamated with the Claimant on the basis set out in the Agreement for Amalgamation between them dated 21 December 2020.

JUDGMENT

1. By an application filed on 21 January 2021 and re-filed in amended form on 28 January 2021, the applicant, Unicorn Crops Limited ("the Company") seeks (a) an order under section 124 of the AIFC Companies Regulations sanctioning an arrangement proposed between the Company and its 100% shareholder, Unicorn Holdings Limited ("the Shareholder") for a reconstruction involving the amalgamation of Zeren Bidai Group Limited Liability Partnership ("the LLP") with the Company, and (b) an order under section 126 of the AIFC Companies Regulations giving effect to the amalgamation of the LLP with the Company.

2. The Company is a Private Company registered in the Astana International Financial Centre and is a "Company" within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations). The Shareholder is also a Private Company. The LLP is a legal entity registered outside the AIFC and operating in accordance with the legislation of the Republic of Kazakhstan.

3. The LLP is named as defendant to the application but the application is not opposed.

4. It is stated in the application, supported by a statement of truth signed by the Company's authorised legal representative, Mr Shynggys Beibituly Oralbayev, that the Shareholder has decided to amalgamate the LLP with the Company and that the Company has decided to amalgamate with the LLP, as confirmed in each case by relevant minutes of meetings and resolutions. It is stated further that the Company, acting as the sole participant of the LLP, has made resolutions for the restructuring and amalgamation, the notification of creditors and the registration of termination of the LLP activity in connection with the amalgamation. Documents filed in support of the application include (a) the Company's Standard Articles of Association, dated 2 October 2020, (b) an Agreement on Amalgamation between the Company and the LLP, dated 21 December, and (c) two notifications dated 24 December 2020 to creditors of the LLP.

5. The Agreement on Amalgamation describes the subject of the Agreement as amalgamation of the LLP with the Company, with the transfer of all rights and obligations of the LLP to the Company (clause 1.1). Basic data on the balance sheets of the parties are set out (clause 3). Detailed provision is made for the reorganisation procedure (clause 4). It is provided that at the end of the reorganisation process "the Private Company becomes the legal successor of [the LLP] for all obligations of [the LLP] in accordance with the transfer act as approved by the authorized body of the [the LLP]" (clause 5.1), and that the reorganisation "is completed as [the LLP] is excluded from the National Register of Business Identification Numbers of the Republic of Kazakhstan" (clause 5.2).

6. I am satisfied that section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% shareholder (section 124(1)(b)).

7. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (section 124(2)), and I take the view that no such order is needed, since the information provided to the Court is that a meeting has already been held at which the Shareholder (being the sole shareholder in the Company) has already passed a resolution in favour of the proposal on the basis of full information as to that proposal.

8. The Court has not been informed of any objection to the proposal. Moreover the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company which on the face of it has sufficient assets to meet the existing liabilities of the LLP.

9. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under section 124(3).

10. Section 126 provides that if an application is made to the Court under section 124 for the sanctioning of an arrangement between a Company and its shareholders, "the Court may make any orders as it considers appropriate to facilitate the … arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company". It provides further that "in this section Company may be taken to include a Body Corporate incorporated outside the AIFC".

11. The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section, but that wording is not exhaustive of the forms of amalgamation that may be ordered ("*including* … an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC.

12. I therefore conclude that the Court should make an order under section 126 that the LLP be amalgamated with the Company on the basis set out in the Agreement for Amalgamation between them dated 21 December 2020.

By the Court,

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

11 May 2021

CASE No: AIFC-C/CFI/2021/0003

(1) BIZONE KAZAKHSTAN LTD
(2) TRANSTECHNOOIL-A LLP

Claimants

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

Court

ORDER

The Court approves under section 124 of the AIFC Companies Regulations the arrangement for amalgamation of the Second Claimant with the First Claimant in accordance with resolutions dated 25 March 2021.

JUDGMENT

1. By an application filed at the Court on 29 April 2021 and clarified by email dated 6 May 2021, the Claimants seek an order under section 124 of the AIFC Companies Regulations approving a proposed arrangement for the amalgamation of the Second Claimant with the First Claimant.

2. The First Claimant, BiZone Kazakhstan Ltd, is a private company incorporated in the Astana International Financial Centre.

3. The sole shareholder of the First Claimant is BiZone LLC, a private company incorporated under the laws of the Russian Federation.

4. The Second Claimant, TransTechnoOil-A LLP, is a limited liability partnership registered under the laws of the Republic of Kazakhstan. The First Claimant is the sole participant in the Second Claimant.

5. The proposed arrangement is one under which the Second Claimant transfers to the First Claimant, and the First Claimant accepts, "all the property, financial and other rights and liabilities of the Partnership subject to all [its] creditors and debtors, including all the liabilities litigated by Partnership and/or third parties …", so that the First Claimant becomes the legal successor to the Second Claimant, whilst the Second Claimant will be wound up. The arrangement has been agreed to by BiZone LLC as sole shareholder in the First Claimant, by a resolution dated 25 March 2021. It has also been agreed to by the First Claimant as sole participant in the Second Claimant, by a separate resolution dated 25 March 2021.

6. Section 124 applies if, *inter alia*, an arrangement is proposed between a Company and its Shareholders or a class of its Shareholders. The First Claimant is a "Company" within the meaning of the section, and the proposed arrangement involves BiZone LLC as its sole Shareholder. Although section 124(2) empowers the Court to order that a meeting of the Shareholders be held, no such order is sought or required in the present case, since the sole Shareholder has already approved the proposed arrangement. Section 124(3) empowers the Court to sanction an arrangement if a majority in number representing three-quarters of the voting rights of the Shareholders present and voting at a meeting agree to the arrangement. That threshold has plainly been met.

7. There is no evident reason for objection to the proposed arrangement. There are no other Shareholders whose interests would otherwise need to be taken into account. The Second Claimant is stated to have no creditors but notice of the proposal has been published and the proposed arrangement involves transfer of the Second Claimant's liabilities to the First Claimant in any event.

8. In the circumstances, I am satisfied that the Court should exercise its power under section 124(3) to make an order approving the arrangement.

By the Court,

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

30 September 2021

CASE No: AIFC-C/CFI/2021/0007

JSC CENGIZ INSAAT SANAYI VE TICARET A.S.

Claimant

and

THE COMMITTEE FOR ROADS OF THE MINISTRY OF INDUSTRY AND INFRASTRUCTURE DEVELOPMENT OF THE REPUBLIC OF KAZAKHSTAN

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Jack Beatson

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 23 September 2021 the Claimant seeks an Order from this Court to enforce the measures set forth in paragraph 46 of the Arbitration Award dated 2 September 2021 made by Dr. Ilia Rachkov, the sole arbitrator appointed by a letter dated 28 June 2021 of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in Case IAC Arbitration No 3/2021.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

   That the Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan pay to Cengiz Insaat Sanayi ve Ticaret A.S.:

   (1) the principal debt under the Contract equal to 281,325,891.89 tenge;
   (2) the financing charges under the Contract equal to 177,960,376 tenge; and
   (3) the costs of this arbitration equal to 20,000 US dollars;

   By no later than 6pm Nur-Sultan time on Monday 18 October 2021, being 18 days from the date of this Judgment and Order.

3. The Defendant is given liberty to apply to have this Order set aside within 14 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Mr. Yensibayev Daniyaz Muratovich, Law Lab

The Defendant was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

16 August 2021

CASE No: AIFC-C/CFI/2021/0004

AMEGA STROY LLP

Claimant

v

SPETSTRANS + K LLP

Defendant

JUDGMENT

Justice of the Court:

Justice Sir Rupert Jackson

JUDGMENT

1. On 14 June 2021 Amega Stroy LLP ('Amega') issued a claim against Spetstrans+K LLP ('Spetstrans') for sums due under a settlement agreement. The claim form was served on 14 June 2021. Spetstrans failed to file and serve an acknowledgement of service as required by Part 7 of the AIFC Court Rules, either in time or at all. In those circumstances, Amega seeks judgment in default pursuant to rules 7.5 and 9.4 of the Rules.

2. The background facts are as follows. By a contract dated 25 January 2017 Spetstrans employed Amega to construct a housing complex on Baitursynov Street, Astana. Disputes about payment developed and these were referred to mediation. The mediator was Meyramgul Abibullaevna Shabylova. The mediation agreement was dated 24 May 2019. The mediation resulted in a settlement agreement, which was signed by the parties and the mediator. Under section 7 of the mediation agreement Spetstrans agreed to pay to Amega sums totalling KZT 542,881,443. Spetstrans failed to pay that sum or any part of it.

3. Both parties have conferred jurisdiction on this court by agreement: see the statement signed by N A Askerova, a director of Amega, dated 25 March 2021, and the statement signed by A N Dergachev, a director of Spetstrans, dated 26 March 2021.

4. Amega's claim form sets out the facts concisely, with relevant documents attached. Spetstrans has not exercised its right to challenge any of those facts by serving an acknowledgement of service and defence. In those circumstances, the court enters judgment for the sum claimed, namely KZT 542,881,443.

ORDER:

1. THE DEFENDANT DO PAY TO THE CLAIMANT KZT 542,881,443 WITHIN 21 DAYS FROM THE DATE OF THIS ORDER

By the Court,

КАЗАКСТАН РЕСПУБЛИКАСЫ
АСТАНА КАЛАСЫ
ТОО «Amega Stroy»
ЖАУАПКЕРШІЛІГІ
ШЕКТЕУЛІ
СЕРІКТЕСТІГІ

ТОО «Amega Stroy»

РЕСПУБЛИКА КАЗАХСТАН
ГОРОД АСТАНА
ТОВАРИЩЕСТВО
С ОГРАНИЧЕННОЙ
ОТВЕТСТВЕННОСТЬЮ
ТОО «AmegaStroy»

г.Нур-Султан БИН030840015666 ст.ф-ал АО «Цеснабанк» ИИК KZ60998BTB0000355578

исх №1-47 от 25.03.2021 года

В Суд МФЦА
от ТОО «Amega Stroy»
БИН 030840015666

ЗАЯВЛЕНИЕ

ТОО «Amega Stroy» БИН 030840015666 дает свое согласие на рассмотрение спора между ТОО «Спецтранс+К» БИН 041040008926 и ТОО «Amega Stroy» БИН 030840015666 в Суде Международного Финансового Центра «Астана»

Директор ТОО
«Amega Stroy» **Аскерова Н.А**

ЖАУАПКЕРШІЛІГІ ШЕКТЕУЛІ СЕРІКТЕСТІГІ "Amega Stroy" ТОВАРИЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ
КАЗАКСТАН РЕСПУБЛИКАСЫ АСТАНА КАЛАСЫ РЕСПУБЛИКА КАЗАХСТАН Г АСТАНА

Translation from Russian

REPUBLIC OF KAZAKHSTAN
ASTANA CITY
«Amega Stroy» LLP
LIMITED LIABILITY PARTNERSHIP

Nur-Sultan City, BIN 030840015666, Metropolitan branch "Tsesna Bank" JSC, IIC:KZ60998BTB0000355578

Outgoing number: 1-47
Dated: March 25, 2021

To the AIFC Court
from AmegaStroy LLP
BIN 030840015666

STATEMENT

«Amega Stroy» LLP, BIN 030840015666, grants its consent to the consideration of the dispute between «Spetstrans + K» LLP, BIN 041040008926, and «Amega Stroy» LLP, BIN 030840015666, in the Court of the Astana International Financial Center.

Director of
«Amega Stroy» LLP /signed/Askerova N.A.

/seal of the «Amega Stroy» LLP/

КАЗАКСТАН РЕСПУБЛИКАСЫ
АСТАНА ҚАЛАСЫ
ТОО «СпецТранс+К»
ЖАУАПКЕРШІЛІГІ
ШЕКТЕУЛІ
СЕРІКТЕСТІГІ

ТОО «СпецТранс+К»

РЕСПУБЛИКА КАЗАХСТАН
ГОРОД АСТАНА
ТОВАРИЩЕСТВО
С ОГРАНИЧЕННОЙ
ОТВЕТСТВЕННОСТЬЮ
ТОО «СпецТранс+К»

№39 от 26.03.2021г

В Суд МФЦА
от ТОО «Спецтранс+К»
БИН 041040008926

ЗАЯВЛЕНИЕ

ТОО «Спецтранс+К» БИН 041040008926 дает свое согласие на рассмотрение спора между ТОО «Amega Stroy» БИН 030840015666 и ТОО «Спецтранс+К» БИН 041040008926 в Суде Международного Финансового Центра «Астана»

Директор ТОО
«Спецтранс+К» **Дергачев А.Н**

Translation from Russian

REPUBLIC OF KAZAKHSTAN
ASTANA CITY
«Spetstrans + K» LLP
LIMITED LIABILITY PARTNERSHIP

No. 39
dated March 26, 2021

To the AIFC Court
from «Spetstrans + K» LLP
BIN 041040008926

STATEMENT

«Spetstrans + K» LLP, BIN 041040008926, grants its consent to the consideration of the dispute between «Amega Stroy» LLP, BIN 030840015666, and «Spetstrans + K» LLP, BIN 041040008926, in the Court of the Astana International Financial Center.

Director of
«Spetstrans + K» LLP/signed/Dergachev A.N.

/seal of the «Spetstrans+ K» LLP/

IN THE COURT OF FIRST INSTANCE
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

CASE No: AIFC-C/CFI/2021/0005

Date of Hearing: 18 October 2021
Further written submissions received during October and November 2021
Date of Judgment: 16 November 2021

Representation:
For the Claimant: Ms Gulnur Nurkeyeva, Mr Daniyaz Yensibayev, Ms Akzhan Sargaskayeva (Grata International Law Firm)
For the Defendant: Mr Zhandos Igembayev, Mr Zhambyl Baktiyar, Mr Dauren Mamutov (Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan)

JSC Cengiz Insaat Sanayi ve Ticaret A.S.

Claimant

v

The Committee for Roads of the Ministry of Industry and Infrastructure Development of the Republic of Kazakhstan

Defendant

JUDGMENT

Justice of the Court:
Justice Sir Rupert Jackson

JUDGMENT

This judgment is in eight parts, namely:

Part 1. INTRODUCTION

1.1. This is a claim by a building contractor for payment of sums due on an interim certificate and on the final payment certificate in respect of road building works carried out under a contract embodying the FIDIC conditions. The road in question is a major highway running from Western China though Kazakhstan to the border with the Russian Federation. The road building project was financed by the European Bank for Reconstruction and Development. The section of road the subject of this litigation is in the Aktobe region of Kazakhstan.

1.2 In this judgment I will use the following abbreviations:

'AIFC' means Astana International Financial Centre.
'Cengiz' means Cengiz Insaat Sanayi ve Ticaret A.S., a company incorporated in Turkey, the claimant.
'EBRD' means European Bank for Reconstruction and Development.
'FIDIC' means International Federation of Consulting Engineers.
'Ivrus' means Ivrus LLP, a company which was a subcontractor to Cengiz.
'Resolution 260' means Resolution 7117-18-00-2-3m/260 issued by District Court No. 2 of the Saryarkinsky District of Nur-Sultan.
'Solution 1591' means Solution 7119-19-00-2/1591 issued by the Specialised Interdistrict Economic Court of Nur-Sultan.
'The audit report' means audit report 43/17 dated 6 December 2017 prepared by the CISA.
'The Committee' means the Committee for Roads of the Ministry of Industry and Infrastructural Development of the Republic of Kazakhstan, the defendant.
'The Enforcement Law' means the Law Regarding the Enforcement Proceedings and the Status of Bailiffs.

In the course of this judgment I will refer to the claimant as either Cengiz or the claimant. I will refer to the defendant as either the Committee or the defendant.

1.3 Mr Zhambyl Baktiyar is Deputy Chairman of the Committee. Mr Dauren Mamutov is employed by the Committee as a consultant and a contract specialist. With the consent of the court, they both undertook some of the advocacy on behalf of the Committee at trial.

1.4 After these introductory remarks, I must now turn to the facts.

Part 2. THE FACTS

2.1 By a contract dated 12 July 2010 ('the road contract' or 'the contract') the Committee engaged Cengiz to carry out civil works on the construction of the road "Aktobe-Martuk-border of Russian Federation" under the South-West Corridor Road Project (Western Europe-Western China International Transit Corridor).

2.2 The road contract incorporated the following documents:

(a) the Minutes of Contract Clarifications
(b) the Letter of Acceptance
(c) the Letter of Tender
(d) the Tender Addendum Notice No. 1
(e) the Particular Conditions
(f) the General Conditions (FIDIC Conditions, first edition, 1999)
(g) the Completed Schedules
(h) the Data of Statistics Agency of the Republic of Kazakhstan
(i) the Specification
(j) the Bills of Quantities
(k) the Drawings
(l) the Performance Security
(m) the Advance Payment Security.

The contract is governed by the law of the Republic of Kazakhstan.

2.3 By Addendum 1 to the contract dated 25 May 2021, the parties agreed that all disputes in connection with the contract should be subject to the exclusive jurisdiction of the AIFC Court.

2.4 Cengiz substantially completed the works, subject to minor outstanding works and rectification of defects by 1 October 2013. On that date the Engineer issued a Taking Over Certificate, pursuant to clause 10.1 of the General Conditions.

2.5 By interim certificate 25, dated 9 April 2015, the Engineer certified that KZT 711,132,558.03 were due to Cengiz.

2.6 Cengiz completed the outstanding works and remedied the notified defects by 30 September 2015. On that date the Engineer issued a Performance Certificate pursuant to clause 11.9 of the General Conditions.

2.7 The final payment certificate, dated 19 March 2016, recorded that KZT 83,695,823 were due to Cengiz.

2.8 The Committee failed to pay the sums due under interim certificate 25 and the final payment certificate.

2.9 Allegations were made that Ivrus LLP, a subcontractor of Cengiz, had knowingly submitted false information to the statistics authorities of the Aktobe region, concerning the inflated costs of crushed stone, grade M1000 of fraction 40-70. These allegations were based upon findings made in an audit carried out during 2017. Those findings were set out in audit report 43/17 dated 6 December 2017.

2.10 At this point I should break off the narrative to deal with a red herring. There was at one stage a dispute about whether there could be any price adjustment for increases in costs. The Committee, to its credit, was determined to pay contractors for legitimate increases in costs. They took the issue to the Supreme Court and established the principle that contractors should be compensated for increased costs. See the decisions of the Kazakhstan courts on this issue dated 31 January 2018, 28 May 2018, and 13 November 2018. The November 2018 decision was a judgment of the Supreme Court of the Republic of Kazakhstan. Although a great deal of material has been put before the court concerning this particular saga, none of it is relevant to the present case.

2.11 On 8 November 2017, Mr Ignatiev, the director of Ivrus, was recognised as a suspect in a criminal case number 11700001210000 under article 177, part 4, item b of the Criminal Code of the Republic of Kazakhstan. The essence of the allegations against him was that he had misused the contractual provisions concerning costs increases. By providing inaccurate information about the costs of crushed stone, he had secured inflated payments to Ivrus; he had thereby in effect stolen money from the state. It was said that those inflated payments were routed through Cengiz, although there is no suggestion in the documents before the court that Cengiz was party to that deception.

2.12 On 18 February 2018, Judge A.I. Isaeva, the investigating judge of District Court No. 2 of the Saryarkinsky District of Nur-Sultan, issued Resolution 260. In that Resolution Judge Isaeva noted the findings in audit report 43/17. The judge had regard to articles 53-56, 161 and 163 of the Code of Criminal Procedure. She authorised the arrest of funds in the correspondent account of the Ministry of Industry and Development of the Republic of Kazakhstan, which were allocated for payment to Cengiz under the road contract.

2.13 On 8 February 2019, the criminal proceedings were terminated on the grounds that no criminal offence had been committed: see page 4 of Solution 1591. There has been some confusion about what happened subsequently. But it appears from an authoritative document produced half-way through the trial of this litigation that the criminal proceedings were subsequently revived and are currently ongoing.

2.14 On 21 April 2020, the Committee wrote to Cengiz, stating that it would suspend payment in 'final certificate 25' (apparently meaning interim certificate 25 and the final payment certificate, which was numbered 26) on the basis of Resolution 260.

2.15 In a letter to Cengiz's lawyer dated 5 April 2021, the Committee stated that payment of interim certificate 25 and the final payment certificate 'was suspended by order of the investigating judge' in Resolution 260.

2.16 Cengiz was aggrieved by the Committee's refusal to pay. Accordingly, it commenced the present proceedings.

PART 3. THE PRESENT PROCEEDINGS

3.1 By a claim form issued in the AIFC Court on 19 July 2021, Cengiz claimed against the Committee the sums due on the two unpaid certificates, together with financing charges as compensation for late payment. In reliance upon various documents listed in paragraph 2.7 of the claim form, Cengiz argued that the decision of Judge Isaeva, contained in Resolution 260, did not entitle the Committee to withhold payment.

3.2 The Committee served its defence on 3 September 2021. The Committee pleaded that by reason of the subcontractor's illegal actions, Cengiz had received an escalation of KZT 760 million to which

it was not entitled. The Committee maintained that both Resolution 260 and Solution 1591 made it unlawful for the Committee to pay the sums due on the two certificates. Accordingly, the claim should be dismissed.

3.3 Cengiz served its reply on 13 September 2021. Cengiz argued that Resolution 260 must be enforced by a bailiff in accordance with article 163 of the Code of Criminal Procedure. The Committee is not entitled to execute Resolution 260 directly. Furthermore, Resolution 260 expired after one year and so cannot now be enforced at all. Solution 1591 relates to a different contract with the serial number 002-ADB/CW-2017, whereas the contract that is the subject of this litigation has the serial number SWCRP-0-102-ERBD/CW.

3.4 The contention that Solution 1591 relates to a different contract seems to me to be well founded. Therefore, like both parties at the trial, I shall focus attention upon Solution 260.

3.5 There was a directions hearing on 23 September 2021. With the agreement of both parties, I fixed a trial date of 18 October 2021. As recorded in paragraph 5 of directions order 2 (dated 24 September), I directed that the audit report be provided to the court by 30 September. As recorded in paragraph 7, I directed:

"The parties must ascertain, agree and notify the court of the current status of the criminal proceedings concerning Mr. Ignatiev and Ivrus LLP in relation to the price of the crushed stone, which is the subject of this litigation. The parties must do this by 6pm Nur-Sultan time on Thursday 30 September 2021."

3.6 These orders did not yield the hoped-for results. There remained some uncertainty about the current status of the criminal proceedings. Neither party furnished a copy of the audit report to the court. The claimant stated that it was unable to do so, because it was not a party to the criminal proceedings. I have no reason to doubt that statement. The defendant (according to Mr Baktiyar) had the ability to obtain a copy of the audit report within ten to fifteen days by making a formal request to the Financial Monitoring Agency of the Republic of Kazakhstan, but it did not do so.

3.7 The trial of this action took place on 18 October 2021. As a result of the Covid pandemic, all previous judicial hearings at the AIFC Court had taken place remotely. The hearing on 18 October 2021 was the first in-person trial to take place in the AIFC Court. The claimant's counsel, Ms Gulnur Nurkeyeva, appeared by video link from Beijing. Her assistants, Mr Daniyaz Yensibayev and Ms Akzhan Sargaskayeva, were present in court. They both undertook some of the advocacy. The defendant's counsel, Mr Zhandos Igembayev, was present in court. He was assisted by Mr Zhambyl Baktiyar and Mr Dauren Mamutov, both employees of the Committee. With the permission of the court, Mr Baktiyar and Mr Mamutov undertook some of the advocacy on behalf of the defence.

3.8 During the short adjournment on 18 October, the defendant's team supplied to the court a short letter stating that the criminal proceedings were ongoing. It follows that those proceedings must have been reinstated at some date after their termination on 8 February 2019, but I do not know the date on which that occurred.

3.9 I asked the parties what the position was about the audit report. Mr Baktiyar accepted that the defendant had done nothing about obtaining that document, despite the court's order made at the directions hearing on 23 September. He stated that the defendant would be able to obtain it within ten or fifteen days by making a formal request to the Financial Monitoring Agency of the Republic of Kazakhstan. He asked the court to allow the defendant time to do that. He also asked the court to defer giving judgment until it had seen the report. The claimant's counsel opposed that application, maintaining that it was made too late and was unnecessary. I was reluctant to

postpone the proceedings for any substantial length of time, because (a) on one view, the claimant had already been kept out of its money for several years, (b) the defendant had created the problem, and (c) the gist of the audit report was clear from Resolution 260. Nevertheless, I gave the defendant permission to provide a copy of the audit report within fifteen days, if it was able to do so. The full text of my ruling is here.

3.10 The claimant called two witnesses at trial, namely Mr Arman Chukuev and Ms Dinara Yeskendirova. Mr Chukuev is an employee of the Ministry of Justice. He works within the Department of Justice of Nur-Sultan City. Ms Yeskendirova is an employee of the Ministry of Finance. She works within the Department of Treasury for Nur-Sultan City.

3.11 During the course of the trial, the defendant's representatives made some observations about the strength of the prosecution case in the criminal proceedings. This is not something which I can take into account. It remains to be seen whether the criminal court will conclude that Mr Ignatiev fraudulently inflated the costs of crushed stone. I note that the allegations have been made but express no view about the outcome.

3.12 On 21 October (three days after the end of the trial) the Committee for Roads wrote to the court, stating that it was unable to obtain a copy of the audit report. The Committee requested that the court should ask the Financial Monitoring Agency to provide a copy of the audit report. On 27 October the claimant responded, strongly opposing that request and arguing that the audit report was of little importance. I did not think it appropriate for the court to take the course proposed by the Committee. The next development was that on 2 November Mr Igembayev unexpectedly delivered a copy of the audit report to the court. The report was in Russian and it was not accompanied by an English translation. In those circumstances, the Registrar immediately obtained a translation – at some expense – and furnished it to me. The audit report seemed to me to be consistent with the summary of that report in Resolution 260. So there was no need for a further hearing. I directed that the parties may make any written submissions which they wished about the report on or before 12 November. Ms Nurkeyeva sent in written submissions on 11 November. Mr Igembayev made no application for an extension of time. He simply sent in the defendant's written submissions late, namely on 15 November.

3.13 Let me make it clear at this stage that the court deplores the defendant's disregard of the order (made on 23 September 2021 and confirmed in writing on 24 September) for production of the audit report. If the defendant had complied with that order at the proper time, the audit report would have been before everyone at the trial and both advocates could have dealt with it in their oral submissions. Instead, both time and costs have been wasted. On this occasion, the court has granted an indulgence to the defendant and allowed late production of the document. I bear in mind that the AIFC Court is a new court and that some people do not yet appreciate that the court's orders must be obeyed. The court will not grant a similar indulgence in future cases.

3.14 Furthermore, if a party cannot comply with a time limit and seeks more time, the proper course is to apply for an extension of time *before* the permitted period has expired. A party cannot simply grant itself an extension of time and take the relevant step late, as the defendant has done in this case.

3.15 The following have emerged as the main issues between the parties:

(i) Whether interim certificate 25 and the final payment certificate are in proper form.

(ii) Whether the Committee came under an obligation to pay the sums stated in interim certificate 25 and the final payment certificate during 2015, 2016 and 2017.

(iii) Given that the Committee did not make those payments in 2015, 2016 and 2017, whether after 11 February 2018 Resolution 260 operated as a bar to making payment on the two certificates, despite the non-involvement of the bailiffs' department.

(iv) Whether Resolution 260 could now operate as a bar to making payment or whether it has expired.

3.16 In addressing these issues, I must apply the law of the Republic of Kazakhstan. This is contained in (amongst much other material) four codes (Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code) and other legislation. For present purposes, the most important legislation is the Enforcement Law. I also bear in mind that the FIDIC Conditions contained in the present contract are widely used on engineering projects around the world. Although there are certain well-known differences of approach between civil and common law jurisdictions, the construction industry operates in the expectation that the FIDIC conditions will be applied in a broadly consistent manner in international construction disputes.

3.17 Having identified the issues and the governing law, I must now turn to issue (i), namely whether the two certificates were in proper form.

PART 4. ISSUE (i): WERE THE TWO CERTIFICATES IN PROPER FORM?

4.1 Mr Mamutov drew attention to the signature on certificate 25. He said that this was the signature of an employee of Kazdorproject LLP. Mr Mamutov submitted that the Engineer under the contract was Egis International and that Kazdorproject LLP were merely sub-consultants to Egis International. Therefore, Kazdorproject LLP could not exercise the powers conferred upon the Engineer under the General Conditions. The signature on the final payment certificate appears to be the same as that on interim certificate 25. So, the same issue arises on the final payment certificate.

4.2 Ms Nurkeyeva submitted that it was too late for the defendant to raise a point of that nature. If the Committee had any objection to the form of the certificates, they should have raised it at the time.

4.3 I am not sure whether Kazakh law includes any doctrine of estoppel by convention. But I do not need to investigate that interesting byway, because Part A of the Particular Conditions (incorporated into the contract, as set out in paragraph 2.2 above) is a complete answer to the defendant's case on this issue. Part A identifies the Engineer as: 'EGIS BCEOM International in association with "Kazdorproject" LLP'.

4.4 Egis International is an engineering company which operates worldwide. As I understand it Kazdorproject LLP is or was an entity set up to provide engineering services specifically for the Western Europe-Western China road project. In my view, Part A of the Particular Conditions authorised either Egis International or Kazdorproject to sign certificates in the capacity of Engineer. It would be over-formalistic and unbusinesslike to require the signatures of both entities on all such documents.

4.5 I will assume that, as Mr Mamutov says, the individual who signed the two certificates was an employee of Kazdorproject LLP. It can be seen that immediately above his signature the following words are printed: 'Egis International-Kazdorproject LLP'. I am quite satisfied that this constitutes an effective signature by the Engineer. It does not matter (if it be the case) that the individual whose handwritten signature appears was an employee of Kazdorproject, not an employee of Egis International.

4.6 Accordingly, my answer to issue (i) is yes. I must now turn to issue (ii).

PART 5. ISSUE (ii): DID THE COMMITTEE COME UNDER AN OBLIGATION TO PAY THE SUMS STATED IN THE TWO CERTIFICATES DURING 2015, 2016 AND 2017?

5.1 Clause 14.7 of the General Conditions provides:

> 'The Engineer shall pay to the Contractor:
> …
> (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents; and
> (c) the amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate.'

5.2 The Particular Conditions make a number of amendments to clause 14. In relation to clause 14.7. They provide:

> 'The Employer shall pay to the Contractor:
> …
> (b) the amount certified in each Interim Payment Certificate within 56 days after the Engineer receives the Statement and supporting documents or, at a time when the Bank's loan or credit (from which part of the payments to the Contractor is being made) is suspended, the amount shown on any statement submitted by the Contractor within 14 days after such statement is submitted, any discrepancy being rectified in the next payment to the Contractor, and
> (c) the amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate or, at a time when the Bank's loan or credit (from which part of the payments to the Contractor is being made) is suspended, the undisputed amount shown in the Final Statement within 56 days after the date of notification of the suspension in accordance with Sub-Clause 16.2 of this Contract.'

5.3 In the present case, it is not suggested that the finance provided by the EBRD for the purpose of paying interim certificate 25 or the final certificate had been suspended. Therefore, since the caveat is inapplicable, the court is dealing in effect with the original form of clause 14.7 as promulgated by FIDIC. During the course of Mr Mamutov's submissions, I asked him why the Committee had not paid interim certificate 25 in 2015 and why it had not paid the final payment certificate in 2016. He replied that the Committee 'felt a lot of doubts' about the data which the contractor had submitted.

5.4 I have some sympathy with the Committee's position. Unfortunately, however, the FIDIC Conditions do not permit the employer to withhold payment on a certificate on the basis that he harbours doubts about its accuracy. They contain formal procedures for challenging Engineer's certificates, in the event that one or other party disagrees with them. But the Committee did not operate those procedures in time or at all. The defendant could have served a notice under clause 2.5, asserting that a lesser sum was due to the contractor than that certified by the Engineer. In the absence of amicable resolution, the defendant could have used the dispute resolution machinery provided in clause 20 as it then stood. There is no evidence in the material before me that they did any of that. Clause 2.5 contains a fairly tight time limit. I appreciate that civil law jurisdictions take a more liberal approach to time bars in construction contracts than common law jurisdictions. But it is now six years after interim certificate 25 and five and a half years after the final certificate. The defendant cannot now invoke the clause 2.5 machinery to challenge the certificates. Indeed, the defendant does not seek to do so in its defence to the present claim.

5.5 In the absence of making any timeous and successful challenges to the certificates, the Committee was obliged to pay each of them within 56 days. The Committee did not do so. Therefore, the Committee's failure to pay certificate 25 in 2015 and its failure to pay the final payment certificate in 2016 were breaches of contract.

5.6 That remained the position throughout 2015 and 2016. The next question to consider is whether the position changed in 2017, when audit report 43/17 was produced. I have carefully considered that report and the parties' submissions about it. Contrary to the claimant's submissions, I am satisfied that the document sent in by Mr Igembayev on 2 November 2021 is the same as the audit report referred to in Resolution 260. The confusion about dates, upon which Ms Nurkeyeva relies, arises because there are two different ways of expressing the same date, namely 06/12/2017 and 12/06/2017. The reference number cited in Resolution 260 is 43/17. The same reference number appears on the document submitted by Mr Igembayev. That puts the identification of the document beyond doubt.

5.7 Mr Igembayev submits that the facts disclosed by the audit report would have entitled the employer to terminate the contract pursuant to clause 15.6 of the FIDIC conditions. It is quite true that if, during the currency of the contract, the Committee had acted on its suspicions (referred to in paragraph 5.3 above), the Committee could have sought to terminate the contract for fraud. The correctness of that termination could then have been tested in subsequent arbitration or litigation between the parties. But none of that happened. Therefore, Mr Igembayev's submissions in this regard remain hypothetical.

5.8 What the authors of audit report 43/17 carried out was a paper exercise. Furthermore, the documents which they examined were incomplete, as acknowledged on page 35 of their report. This report was the start of a criminal investigation, not its conclusion. It did not, indeed could not, nullify certificate 25 or the final certificate. Nor did it extinguish the contractual effect of those certificates. Indeed, the audit body recognised that those two certificates continued to impose payment obligations: see pages 18-19 of the later audit report, dated 10 August 2018.

5.9 Accordingly, my answer to issue (ii) is yes. Whether the Committee continued to be in breach of contract throughout 2018 will depend upon the answer to issue (iii). Therefore, I must now turn to that issue.

6. ISSUE (iii): AFTER 11 FEBRUARY 2018 DID RESOLUTION 260 OPERATE AS A BAR TO MAKING PAYMENT ON THE TWO CERTIFICATES?

6.1 The defendant contends that: (a) by Resolution 260 Judge Isaeva authorised the arrest of the funds allocated for paying interim certificate 25 and the final payment certificate; (b) the Committee gave effect to the judge's order by retaining those funds and not paying them to Cengiz. The Committee's staff would have been committing a criminal offence if they had paid the sums due under those two certificates.

6.2 The claimant has two answers to this contention. First, the audit report on which Resolution 260 is based has been undermined by recent judicial decisions. Secondly, the Committee was not entitled to give effect to Resolution 260, since only the bailiffs' department could do that.

6.3 As to the first point, Ms Nurkeyeva has been pressing an argument both at the case management conference on 23 September and at trial that the findings of the audit report upon which Resolution 260 is based have been undermined by the series of decisions made by the Kazakhstan courts referred to in paragraph 2.10 above. She submits with vigour that the decision of the Supreme Court of the Republic of Kazakhstan dated 13 November 2018 is binding upon this court and that really is

the end of the Committee's case.

6.4 It is not necessary for me to explore the relationship between this court and the Kazakhstan Supreme Court or to consider whether the decision dated 13 November 2018 is strictly binding upon this court. I agree with the reasoning and conclusions of the Supreme Court. The sums payable to the contractor under this contract (and no doubt under the other 48 road building contracts which were being considered by the Supreme Court) fall to be adjusted under clause 13.8 of the FIDIC Conditions.

6.5 The helpful decision of the Kazakhstan Supreme Court deals (as one might expect) with a question of general principle. It does not address (and the Supreme Court were not asked to address) the particular question whether the escalation provisions were correctly applied under contract SWCRP-0-102-ERBD/CW in relation to the cost of crushed stone. As the defendant's advocates rightly pointed out, the Supreme Court decision of 13 November 2018 does not have any bearing on the issues in the present case. I therefore reject this limb of the claimant's case.

6.6 I now come to the second limb of the claimant's case. This requires an analysis of Judge Isaeva's powers and the effect of the order which she made.

6.7 The starting point is the criminal proceedings. These could only be brought against a human being, not against a company: see article 15 of the Criminal Code. So, the 'suspect' was Mr Ignatiev, not Ivrus.

Article 163 of the Criminal Procedure Code provides:

'**Article 163. The order for sanctioning of the seizure of property**

1. The right to sanction arrest on property belongs to the investigating judge, and in the cases provided by points 2) and 3) of a part of the seventh article 107 of the present Code, - judges of regional and equated to it court.

2. The decision of the person carrying out pre-trial investigation on the initiation of the application for seizure of property shall be considered by the investigating judge alone at the place of pre-trial investigation or at the place of discovery of the property of the suspect, accused within twenty-four hours from the moment of receipt of the materials in court.

3. Excluded by the Law of the Republic of Kazakhstan dated 21.12.2017 № 118-VI

4. After considering the application for sanctioning of the seizure of property, the investigating judge shall issue the decision on sanctioning or refusal to sanction the seizure of property.'

6.8 Under article 163 Judge Isaeva was empowered to 'authorise' or 'sanction' the seizure or arrest of the funds. I have seen slightly different versions and translations of article 163, but the gist remains the same. Article 163.7 provides that the judge's decision on the seizure or arrest of property is executed by the bailiff. The terms 'seizure' and 'arrest' appeared to be used interchangeably in the documents and the oral evidence.

6.9 Judge Isaeva's order in the 'Decision' section at the end of Resolution 260 accorded with the language of article 163. The judge decided 'to authorise the arrest of funds in the correspondent account of the Ministry of Industry and Development of the Republic of Kazakhstan works allocated for a fee by AF "Cengiz Insaat" under contract No. SWCRP-0-102-EBRD/CW'.

6.10 Article 163.7 provides that the person who is to execute the seizure or arrest which the judge has authorised is the bailiff. Article 9.1.12 of the Enforcement Law provides that a court decision on the seizure of property, issued in a criminal case, is an executive document. Article 11 of the Enforcement Law provides time limits for presentation of executive documents (including 'a court

decision on the seizure of property issued in a criminal case' – article 11.1.10) for compulsory execution. Article 38 of the Enforcement Law provides what the bailiff should do upon receipt of an executive document. There is no suggestion in the provisions of the Enforcement Law which have been drawn to my attention that anyone other than a bailiff should enforce a court order authorising the arrest of funds.

6.11 Ms Yeskendirova gave evidence about how these provisions operate in practice. She said that the Treasury Department only made payments upon receipt of payment certificates from the relevant ministries. She explained that 'making payment' meant transferring monies received from those ministries to the payees.

6.12 Ms Yeskendirova said that the Treasury would arrest accounts if there was a court decision to arrest the accounts followed by a bailiff's decision to arrest the accounts. If there was a court decision without the decision of the bailiff, 'No, we cannot. We can only do it after the decision by the bailiffs.' Ms Yeskendirova went on to explain that seizures could only be imposed on certain items, not on salaries, social allocations and so forth.

6.13 Ms Yeskendirova drafted a letter dated 25 February 2021, which was approved and signed by the acting head of her department, the Department of Treasury for Nur-Sultan City. That letter stated: 'The department is not empowered to seize accounts state institutions without obtaining documents from the executive bodies of the Ministry of Justice'. The phrase 'executive bodies of the Ministry of Justice' was a reference to the bailiffs' department.

6.14 Ms Nurkeyeva submits that in the present case the Committee never did present Resolution 260 to the bailiffs' department. That submission is supported by the evidence of Mr Chukuev, an employee of the Ministry of Justice, who has examined the relevant records. The defendant did not challenge that part of Mr Chukuev's evidence. The defendant accepts that it did not present Resolution 260 to the bailiffs' department.

6.15 I note, incidentally, that the judgment attached to the Committee's defence, Solution 1591 dated 27 February 2019, provides an example of the arrest procedure working properly and effectively. It can be seen from page 2 that there was a decision of an investigating judge on 27 March 2018 authorising the arrest of funds. On 2 April 2018 the decision of the investigating judge 'was received by the relevant state body [i.e. the bailiffs' department] for execution'. This shows that the procedure can work perfectly satisfactorily, even though that did not happen in the present case.

6.16 An arrest of funds, even if carried out properly does not eliminate the debts which the fundholder was planning to pay with those monies. The debts remain. In the present case, the Committee's debts to Cengiz on the two certificates would remain, even if Resolution 260 had been presented to the bailiffs timeously. In the event, however, the Committee did not go through the necessary formalities. Resolution 260 did not operate so as to prevent the Committee paying out on the two certificates. My answer to issue (iii) is no.

PART 7. ISSUE (iv): COULD RESOLUTION 260 NOW OPERATE AS A BAR TO MAKING PAYMENT ON THE TWO CERTIFICATES?

7.1 Article 11 of the Enforcement Law sets out time limits for presenting executive documents for compulsory execution. In respect of a court decision on the seizure of property issued in a criminal case, the time limit is one year: see article 11.1.10.

7.2 More than three years have elapsed since Judge Isaeva issued Resolution 260. Therefore, it is not now possible to present that decision to the bailiffs' department for compulsory execution.

Accordingly, the answer to issue (iv) is no. Resolution 260 has expired.

PART 8. CONCLUSION

8.1 I have every sympathy with the Committee's determination to control the costs of this massive road building project to proper levels. It is entirely proper that they investigate thoroughly any allegations of wrongdoing by contractors or subcontractors. They have a duty to protect the public purse. But they must do so in accordance with the law of the Republic of Kazakhstan.

8.2 I do not know how strong the case is against Mr Ignatiev. It is not my function to decide that issue. I note that the criminal proceedings against Mr Ignatiev started, then terminated on the basis that there had been no crime and then started again. If the Committee believes that it has been defrauded, it will need to take further (and perhaps more detailed) legal advice as to how it can properly protect the public purse. But what the Committee cannot do is to continue withholding payment from Cengiz on the two outstanding certificates.

8.3 There is no dispute as to the principal sums due. The claimant is entitled to recover financing charges pursuant to clause 14.8 of the General Conditions. This provides for interest at 3% above the central bank discount rate, compounded monthly. After a delay of some six years, financing charges are bound to be substantial. The defendant has not disputed the claimant's calculation of financing charges either in its defence or in argument at trial. That may be because in a recent arbitration between the same parties the Committee's challenge to clause 14.8 failed.

8.4 The court will therefore give judgment for the claimant for 1,335,170,366 tenge, made up as follows:

Interim certificate 25:	711,132,558	tenge
Final payment certificate	83,695,823	tenge
Total principal sum	794,828,381	tenge
Financing charges	540,341,985	tenge
Total	1,335,170,366	tenge

8.5 If the claimant wishes to make an application for costs, it must make its application in writing (with a copy to the defendant) within two weeks from today. The claimant must set out brief details of costs incurred and attach supporting evidence. The defendant must send its response within two weeks thereafter. The claimant must send its reply (if any) within one week thereafter. I will then deal with that application.

ORDER: The defendant do pay to the claimant 1,335,170,366 tenge within 28 days from today.

By Order of the Court,

Sir Rupert Jackson,
Justice, AIFC Court

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

14 December 2021

CASE No: AIFC-C/CFI/2021/0006

SNAB INVEST GROUP LLP

Claimant

v

PEASANT FARM BERKENOV ILDAR ZHAMBULOVICH

Respondent

JUDGMENT

Justice of the Court:

Justice Charles Banner QC

ORDER

1. **The Claim is allowed.**

2. **The Defendant shall pay the Claimant 9,553,666 Tenge within 28 days of this Order (in addition to the principal debt of 9,713,000 Tenge which has already been paid).**

3. **The parties shall bear their own costs of these proceedings.**

JUDGMENT

Introduction

1. This claim arises out of a contract, entitled Goods Purchase and Sale Agreement No 29/06-30 and dated 30 June 2020 ("**the Agreement**"), between the Claimant (referred to as the "Seller" in the Agreement) and the Defendant (referred to as the "Buyer" in the Agreement) for the sale and purchase of plant protection chemicals, the types and amounts of which were specified in the Agreement, for 9,713,000 Tenge.

2. A Goods Transfer-Acceptance Certificate appended to the Agreement and also dated 30 June 2020 confirms that the chemicals were transferred from the Claimant to the Defendant on that date "in the quantity and quality previously agreed by the parties".

3. Clause 4.6 of the Agreement obliged the Defendant to pay the full sum of 9,713,000 Tenge by 1 November 2020. It is common ground between the parties that the Defendant did not do so. As a consequence, the Claimant has brought this claim against the Defendant.

Procedural background

4. Clause 7.2 of the Agreement states that disputes under the agreement "are resolved in the Interdistrict Specialized Economic Court of the Kostanay region in accordance with the current legislation of the Republic of Kazakhstan".

5. Pursuant to this clause, on 4 August 2021 the Claimant filed a claim against the Defendant at the Specialised Interdistrict Economic Court of the Kostanai Region (case reference no: 3971-21-00-2/2521).

6. On 24 August 2021, the Claimant and Defendant signed and dated a Transfer of Cases Consent Form in which they agreed to terminate the case proceeding in the Specialised Interdistrict Economic Court and to transfer the case to the AIFC Court, if the AIFC Court would accept the case.

7. By Order dated 24 September 2021, the Chief Justice of the AIFC Court, Lord Mance, declared that the AIFC Court has and shall exercise jurisdiction over the dispute. That Order is included below as Appendix 1 to this Judgment.

8. On 15 October 2021 the Claimant filed a Claim Form with the AIFC Court.

9. The stated value of the claim in the Claim Form (see paragraph 11 below) is below the financial threshold specified by Rule 28.2(1) of the AIFC Court Rules. The claim therefore falls within the jurisdiction of the AIFC Small Claims Court ("**SCC**").

10. Under Rule 28.39, the SCC has the power to deal with a claim without a hearing. In considering whether to exercise that power the Court will have regard to the expressed views of the parties as well as the overriding objective in Part 1 of the AIFC Court Rules. In Section 5 of the Claim Form, the Claimant requested that the proceedings be determined on the papers without an oral hearing. The Defendant has not challenged that request. In these circumstances, and having regard to the overriding objective, the Court is satisfied that a hearing is not necessary for the just determination of the claim. It has therefore proceeded to determine the claim on the papers.

The issues before the Court

11. Section 2 (Details of Claim) of the Claim Form sought an Order requiring the Defendant to pay the Claimant:

    1) The principal debt of 9,713,000 Tenge;

    2) A fine in the amount of 9,553,666 Tenge, said by the Claimant to be in accordance with Clause 5.2 of the Agreement and Articles 293-296 of the Civil Code of Kazakhstan ("**CCK**"); and

    3) Costs of legal representation in the proceedings, in the amount of 1,700,000 Tenge.

12. On 22 October 2021, the Defendant filed a brief Defence stating that:

    1) It accepted liability to pay the principal debt of 9,713,000 Tenge and that the "delay in payment…occurred due to the difficult financial situation prevailing in the entire economy of the world due to the pandemic";

    2) The fine should be reduced to 50,000 Tenge pursuant to Article 297 CCK, on the basis that it was excessively large compared to the Claimant's losses; and

    3) The claim for costs was excessive given that the case was not particularly complicated.

13. In a Reply filed on 11 November 2021 at the invitation of the Court, the Claimant submitted that the Defendant had not provided any evidential justification for a reduction in the fine, and that the legal costs claimed were proportionate to the value and complexity of the claim.

14. The Court provided the Defendant with an opportunity to respond to the Claimant's Reply, which it did through brief further representations filed on 22 November 2021, which restated the points made in the Defence.

15. This was followed by a letter from the Defendant to the Court dated 8 December 2021 stating that the principal debt had been paid on 25 November 2021 and attaching, as evidence of this, a payment certificate showing the transfer of 9,713,000 Tenge to the Claimant.

16. The Court provided the Claimant with an opportunity to response to this letter by 6pm Nur-Sultan time on 13 December 2021. No response was received.

Consideration of the issues

(i) The principal debt

17. The Defendant has admitted liability for the principal debt of 9,713,000 Tenge. It has provided evidence that it paid this sum to the Claimant on 25 November 2021. That evidence has not been contested by the Claimant and is accepted by the Court.

18. Accordingly, this element of the claim no longer requires determination by the Court.

(ii) The fine

19. Clause 5 of the Agreement is entitled "LIABILITY OF THE PARTIES". At 5.2, it states:

> "For non-timely payment for the goods, the Buyer pays to the Seller a fine of 0.5% of the value of the unpaid Goods for each calendar day of delay in payment, but not more than 100%".

20. As noted above, the governing law of the Agreement is the law of the Republic of Kazakhstan. As appears to be common ground between the parties, Articles 293-298 CCK are of particular relevance. These provide as follows:

> "**Article 293. The Definition of Forfeit**
>
> Damages (fine, penalty) shall be recognized as a monetary amount defined by legislation or agreement, which must be paid by a debtor to the creditor in the case of failure to execute, or improper execution of an obligation, in particular, in the case of a delay in execution. Upon the claim to pay the damages, the creditor shall not be obliged to prove losses caused to him.
>
> **Article 294. The Form of an Agreement on Forfeit**
>
> The agreement on damages must be committed in writing, irrespective of the form of the principal obligation.
>
> Non-compliance with the written form shall entail the nullity of the penalty agreement.
>
> **Article 295. Legal Forfeit**
>
> 1. A creditor shall have the right to claim the payment of damages as determined by legislation (legal damages), irrespective of whether the obligation for its payment is stipulated in the agreement of the parties.
>
> 2. The amount of the legal damages may be increased by agreement of the parties, provided legislation does not prohibit it.
>
> **Article 296. Amount of Forfeit**

The amount of forfeit shall be determined in a fixed monetary amount or in a percentage of the amount in default or the amount of the improperly executed obligation.

Article 297. **Reduction in the amount of penalty**

If the penalty (fine, fee) to be paid is excessively large as compared to the losses of the creditor, the court, at the request of the debtor, shall have the right to reduce the penalty (fine, fee), considering the degree of fulfilment of the obligation by the debtor and the interests of the debtor and creditor that deserve attention.

Article 298. The Grounds for Levying Forfeit

Damages shall be levied for failure to execute or for improper execution of an obligation, when the conditions exist for holding the debtor responsible for violation of the obligation (Article 359 of this Code)."

21. The Defendant does not dispute that, in principle, it is liable to pay a fine under Clause 5.2 of the Agreement and Articles 293-298 CCK, in addition to the principal debt which has now been paid. The dispute relates to the amount of the fine.

22. The Claimant has calculated the claimed sum of 9,553,666 Tenge pursuant to Clause 5.2 of the Agreement. The Defendant does not dispute that this is the correct sum applying the formula in Clause 5.2. The Defendant submits, however, that the figure should be reduced to 50,000 Tenge pursuant to Article 297. The Claimant opposes any reduction.

23. Having had regard to the considerations to which Article 297 refers, the Court declines to reduce the fine. This is for the following reasons:

    1) The starting point is that the parties have agreed the formula by which the fine is to be calculated, under Clause 5.2 of the Agreement, and that the claimed sum of 9,533,666 Tenge has been calculated pursuant to that agreed formula.

    2) As the Claimant notes in its Reply, the Defendant has offered no substantive evidence to justify a reduction from that sum. The points made in its Defence and subsequent correspondence amount to little more than bare assertion.

    3) The Court rejects the Defendant's contention that the fine should be reduced under Article 297 on the ground that the "delay in payment…occurred due to the difficult financial situation prevailing in the entire economy of the world due to the pandemic" (see paragraph 12(1) above). The Defendant has not provided any evidence to demonstrate that it was genuinely unable to pay the principal debt until 25 November 2021 due to the effects of the pandemic. The Court is not prepared to take this assertion at face value without supporting evidence. The Claimant too may have been adversely affected by the pandemic, including and/or exacerbated by non-payment of the sum due to it by the Defendant. Accordingly, in the absence of evidence, the effect of the pandemic is a neutral factor in considering the respective interests of the parties. Further, the parties have agreed Force Majeure provisions in Clause 6 of the Agreement, and the Defendant does not suggest they are engaged by the effect of the pandemic in the circumstances of this case. The Defendant's reliance on the pandemic to reduce the amount due under Clause 5.2 of the Agreement would, if successful, have the effect of undermining the parties' calibration of the Force Majeure clause.

    4) Although the Defendant has now paid the principal debt, it did not do so until over a year after the sum became due and over three months after the Claimant was forced

to commence Court proceedings. The Court proceedings were well advanced by the time the Defendant finally paid.

(iii) Costs

24. The third and final element of the claim is for the Claimant's legal costs of 1,700,000 Tenge.

25. The recoverability of costs in proceedings before the SCC is governed by Rule 26.9 of the AIFC Court Rules, which provides:

> "The SCC may not order a party to a small claim to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except:
>
> (1) such part of any Court fees paid by that other party as the SCC may consider appropriate;
>
> (2) and such further costs as the SCC may assess by the summary procedure and order to be paid by a party who has behaved unreasonably."

26. The Claimant was not required to pay a Court fee in this case.

27. There is no basis for the Court to conclude that the Defendant has behaved unreasonably in these proceedings. The Claimant does not allege such behaviour.

28. Accordingly, applying Rule 26.9, there are no grounds for an award of costs.

Conclusion

29. The Claim is allowed. The Court will order the Defendant to pay the Claimant a fine of 9,553,666 Tenge, payable within 28 days. This is in addition to the principal debt of 9,713,000 Tenge which has already been paid. There will be no order as to costs.

By the Court,

Charles Banner QC,
Justice, AIFC Court

Representation:

The Claimant was represented by Amirov Nurzhan Amantayevich.

The Defendant was represented by Shokobalinov Zhumash Abdrakhimovich

Appendix 1

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

BEFORE THE CHIEF JUSTICE, THE RIGHT HONOURABLE LORD MANCE

24 September 2021

AIFC Court Case No: AIFC-C/CFI/2021/0006

SNAB INVEST GROUP LLP

Claimant

and

PEASANT FARM BERKENOV ILDAR ZHAMBULOVICH

Defendant

ORDER

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1. Under Article 13 of the Constitutional Statute on The Astana International Financial Court ("the AIFC Court") No 438-V of 7 December 2015, as amended on 22 December 2017 with effect from 9 January 2018 and under Regulation 26(1)(c) and (3) of the AIFC Court Regulations dated 5 December 2017, the AIFC Court has exclusive jurisdiction over any disputes transferred to the Court by agreement of the parties.

2. Regulations 26(9) and (10) of the AIFC Court Regulations further provide:

> 26(9): "Any issue as to whether a dispute falls within the jurisdiction of the Court shall be determined by the Court whose decision shall be final."
> 26(10): "The AIFC Court shall consider the express accord of the parties to a case that the Court shall have jurisdiction and if the Court considers it desirable or appropriate, it may decline jurisdiction or may refer any proceedings to another Court within the Republic of Kazakhstan."

3. On 4 August 2021, the Claimant filed at the Specialised Interdistrict Economic Court of the Kostanai Region, Case Reference No: 3971-21-00-2/2521, a claim against the Defendant. That Court has not considered the merits of the dispute or given any decision on them.

4. The Claimant and Defendant have by Transfer of Cases Consent Form signed and dated 24 August2021 agreed to terminate the case proceeding in the said Specialised Interdistrict Economic Courtand to transfer the case to the AIFC Court, if the AIFC Court accepts the case.

5. As appear by the said Transfer of Cases Consent Form, the Claimant's claim is for sums alleged tobe due under a contract of sale of plant protection chemicals and for failure to pay such sums indue course, as well as for a process agent's service, while the Defendant does not admit all or some of such claim.

6. Having considered the matters recited above, including the express accord of the parties to the AIFC Court's jurisdiction and the nature of the dispute, I am satisfied that this is an appropriate case for transfer to and determination by the AIFC Court.

7. Pursuant to the provisions recited in paragraphs 1 and 2 above, I declare accordingly that the AIFC Court has and shall exercise jurisdiction over this dispute.

By the AIFC Court of First Instance,

The Right Honourable Lord Mance
Chief Justice, AIFC Court

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 December 2021

CASE No: AIFC-C/CFI/2021/0013

METALLINVESTATYRAU LLP

Claimant

v

AKSAYSTROY-2020 LLP

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. **The Defendant is restrained from disposing of any of its assets in the Republic of Kazakhstan including accounts in any banks, which shall be frozen in the amount of no more than KZT 22,186,710.**

2. **The Defendant has permission to apply to have this Order set aside within 14 days of service upon it of this Order.**

JUDGMENT

1. The Claimant applies for the enforcement of an interim measure made in an award dated 24 November 2021 (**"the Award"**). The Award was made and signed by a sole arbitrator and was issued under the IAC Arbitration and Mediation Rules.

2. By paragraph 43 of the Award, the arbitrator granted the Claimant an interim measure, freezing the Defendant's property in the Republic of Kazakhstan, including any money in bank accounts, for an amount not exceeding KZT 22,186,710 (**"the Interim Measure"**).

3. The Interim Measure was in the following terms:

> "An interim measure is provided in the form of freezing of any property of the Respondent in the Republic of Kazakhstan, including accounts in any banks for an amount not exceeding a total of 22,186,710 (twenty-two million one hundred and eighty-six thousand seven hundred and ten tenge)."

4. Article 27(3) of the AIFC Arbitration Regulations 2017 set out the exclusive circumstances in which recognition or enforcement of an interim measure may be refused. I am not aware that any of those circumstances have been met.

5. Rule 27.31 of the AIFC Court Rules requires a party applying to enforce an interim measure to file written evidence showing that the application is made with the written permission of the Arbitral Tribunal.

6. In this case, the arbitrator granted that permission in paragraph 43(2) of the Award.

7. In the circumstances, I am satisfied that this is an appropriate case for enforcement of the Interim Measure. I will adjust the language of the Interim Measure very slightly, to make it consistent with prior orders of this Court, in particular the Order of Justice Sir Robin Jacob in *JSC Astana International Financial Centre Authority v Onyx Heavy Machinery Ltd* [2020] AIFC 0004 (23 July 2020).

8. I have not heard from the Defendant on the application. In the circumstances, I will allow them a period of 14 days within which to apply to set aside this Order, should they choose to do so.

By the Court,

Representation:

The Claimant was represented by Azhgaliyev Rakhat.

The Defendant was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

15 November 2021

CASE No: AIFC-C/SCC/2021/0009

AGSA LLP

Claimant

v

KAZPROFOBRAZOVANIE LLP

Defendant

ORDER

Justice of the Court:

Justice Patricia Edwards

ORDER

BY REQUEST:

1. The claim is discontinued.

By the AIFC Small Claims Court,

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

22 January 2021

CASE No: AIFC-C/SCC/2020/0008

AURORA AG LIMITED

Claimant

and

STAR ASIAN MINING COMPANY LLP

Defendant

ORDER

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

BY CONSENT:

1. The claim is discontinued.

By the AIFC Small Claims Court,